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Supreme Court of the United States

OCTOBER TERM, _____.

Nos. 300 and 301.

SOUTHERN RAILWAY COMPANY, - - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, BY, ETC., - *Appellee.*

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, - - - - - - *Appellant,*

versus

COMMONWEALTH OF KENTUCKY, BY, ETC., - *Appellee.*

REPLY BRIEF FOR APPELLANT.

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WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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REPLY BRIEF FOR APPELLANT.

We ask the indulgence of the Court to a short reply brief.

1.

Appellee's brief is a second petition for rehearing. The first petition for rehearing was denied immediately following the opinion reported in 274 U. S. 76.

Appellee's argument, as in the first petition for rehearing, is that the additional franchise assessment is not against the 127.63 miles of the Southern Railway Company in Kentucky, but is against such mileage plus the 197.50 miles of the Cincinnati, New Orleans and Texas Pacific Railway Company. This argument is clearly erroneous, as was held by this Court on the former appeal.

The suit is to assess the value of the alleged omitted franchise or intangible property in Kentucky of the Virginia corporation. No other railroad is a defendant. It is not claimed that any other railroad had an additional franchise value.

In 193 Ky. 474, the Kentucky Court of Appeals held that because the Virginia corporation owned all of the stock of the separate Southern Railway Company in Kentucky, and because of other peculiar unifying facts, that, for franchise tax purposes, the Southern Railway Company in Kentucky ceased to be a separate entity, and that it was in law the Virginia corporation.

In other words, for the purpose of this suit, the Court wiped out the Southern Railway Company in Kentucky, and held that its 127.63 miles was but a division of the Virginia corporation, and that franchise taxes should be assessed on that basis.

Therefore, the entire purpose of the case was, and is, to fix the added intangible property value, if any, that adhered in these 127.63 miles because it was but a division of the Virginia corporation instead of a separate entity.

It was stipulated that each separate railroad in Kentucky referred to in pleadings or exhibits, to-wit, the Southern Railway Company in Kentucky, the Cumberland Railroad Company, the Cumberland Railway Company, the Mobile and Ohio Railroad Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company, had made full reports and paid the full tax assessed on their respective tangible and intangible property (Stipulation 16, R. 101; Stipulation 2, R. 183).

The C. N. O. & T. P. is not, has never been held to be, and cannot be held to be the Virginia corporation. The C. N. O. & T. P. is an entirely separate entity. The Virginia corporation does not even own a majority of its capital stock. The Virginia corporation merely controls it in the following indirect manner:

A majority of the voting stock of the C. N. O. & T. P. is owned by the Southwestern Construction Company. Since 1917, the stock of the Southwestern Construction Company owned by the Alabama Great Southern plus the stock of the Southwestern Construction Company owned by the Virginia corporation has constituted a majority of the stock of the Southwestern Construction Company. The Virginia corporation owns a majority of the stock of the Alabama Great Southern (R. 38, 90).

That the above does not mean that the Virginia corporation itself owns a majority of the stock of the C. N. O. & T. P. is a plain arithmetical proposition.

Under the Kentucky Statutes, the value of the franchise of an interstate carrier is determined, as stated by this Court on the first appeal (274 U. S. 76-78):

> "Where the railroad (in this case the defendant Virginia corporation with its 127.63 miles in Kentucky) is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes. * * *"

While it is true that in assessing the value of the franchise of the particular railroad, mileage, income, etc., of owned, operated, leased and controlled roads is used, nevertheless the franchise value so found is the franchise value of the particular road to be assessed—in this case the 127.63 miles of the Kentucky corporation. We are not assessing the franchise value of the separate C. N. O. & T. P. That road has already paid its own taxes. Its figures are properly used in ascertaining the value of the Virginia corporation because it is one of the large number of owned, operated, leased or controlled roads. The resultant figure, according to the statute, and according to this Court's interpretation of the statute, is the franchise or intangible property value of the defendant Virginia corporation and of that corporation alone. Therefore, the resultant fig-

ure, whatever it may be, is assignable only to the mileage of the road to be assessed, *i. e.*, the Virginia corporation with its 127.63 miles in Kentucky.

It was erroneous, therefore, for the State Circuit Court and for the Kentucky Court of Appeals to spread the alleged additional intangible value of the defendant corporation over the mileage of the C. N. O. & T. P. Timely objection to this method of spreading the valuation was made in both the Circuit Court and in the Court of Appeals.

2.

On page 4 of appellee's brief, the statement is made that there was a mistake in the record in that an amended petition was not filed prior to the previous appeal to this Court. We have never heard of any such amended petition. It will be noted when appellee filed its petition for rehearing, after the first opinion in this case, that no claim was then made of any such mistake in the pleadings.

3.

At numerous places in appellee's brief, the statement is made that the assessment should have been approximately half a million dollars more. This statement is based on the alleged claim that all figures with reference to the Cumberland Railroad, Cumberland Railway, and Mobile and Ohio Railroad should have been excluded from the calculation.

As a matter of fact, appellee stipulated on November 2, 1928, after the first opinion of this Court that:

"2. During all of the times involved herein, the defendant, Southern Railway Company, owned a majority of the stock of the Mobile and Ohio Railroad Company, the Cumberland Railroad Company and the Cumberland Railway Company.

* * * * * * *

"5. During each of the years in question, the assessing authorities of the State of Kentucky—the State Tax Commission—uniformly, systematically and intentionally assessed the franchise tax of all common carriers having lines within and without the State of Kentucky upon the following basis, to-wit:

"The carrier's railway system was deemed to include the lines owned, operated, leased or controlled by it, and wherever the carrier owned a majority of the capital stock of another carrier, such ownership of stock was deemed to constitute the second carrier as being owned by the first; that the net railway operating income of the carrier and of the lines owned, operated, leased and controlled by it—taxes, hire of equipment and joint facility rents being deducted—was capitalized at 7%; that there was then deducted the total excess values outside of the State of Kentucky of the carrier proposed to be assessed, and of the lines owned, operated, leased or controlled by it; there was then assigned to Kentucky the proportion that the number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky bore to the total number of miles of the carrier and of the lines owned, operated, leased or controlled by it in Kentucky and elsewhere. * * *." (R. 270, 275.)

It would plainly have been unconstitutional for the Court, in the instant case, to have assessed the defendant on a basis different from that employed uniformly, systematically and intentionally in assessing value of all other common carriers.

Greene, *et al.*, v. Louis. & Interurban R. Co., 244 U. S. 499.

Counsel concedes that the basis adopted by the Court in including the figures of these three controlled roads was proper.

> "To avoid all confusion on this subject, we moved the Court to omit these lines (Cumberland Railroad, Cumberland Railway, and Mobile and Ohio Railroad) in making the assessment, and the appellant objected, for to omit them would be to increase the assessment. We took no cross-appeal from the judgment, believing that the Court was right. * * *" (Appellee's brief, p. 6.)

As a matter of fact, we did not object because the assessment would have been higher. Our objection was pleaded in our answer to the effect that an assessment based on a different calculation than that uniformly applied would be unconstitutional (R. 243, 255).

> "The defendants, and each of them, say that to assess a franchise tax on a basis which omits from all calculations the earnings, the mileage, excess values, and other figures of the said three common carriers, which during the years involved were owned by the defendant, Southern Railway Company, would be a violation of the Constitution of the State of Kentucky, and a violation of the Con-

stitution of the United States, particularly the due process and equal protection clauses of the Fourteenth Amendment thereof."

After stating that no cross-appeal was taken because the calculation of the Court was correct, it is startling to find that counsel thereafter claims in the brief that the assessment was too low.

4.

Appellee states:

"This appeal offers a new case to this Court. The pleadings are new. The evidence is new, for additional facts were stipulated on the return of the Woodford Circuit Court. * * *" (Appellee's Brief, p. 8.)

It would be easy to go through the pleadings and stipulation and demonstrate that there is nothing new in the present record, except that the amendment was filed "for the purpose of making a claim for taxes against (or in respect of) the line of the Cincinnati, New Orleans and Texas Pacific."

The case is the same now as on the first appeal, *i. e.*, an attempt to fix an alleged additional value on the 127.63 miles of the Virginia corporation in Kentucky.

5.

Appellee states in its brief:

"Some part of the capital operating the system must be apportioned to the Kentucky lines.

> What that part should be was a question to be determined by the circuit court. Its decision as to the amount was not only acquiesced in, but on appeal to the Court of Appeals was expressly conceded to be correct. * * *" (Appellee's Brief, p. 22.)

As a matter of fact, the amount of the judgment presently appealed from was most vigorously attacked in the Court of Appeals and was not acquiesced in.

The only explanation of the above erroneous statement is that the entire paragraph from which it is taken is copied bodily from appellee's brief in this Court on the first appeal. The concluding paragraph on page 14, all of pages 15, 16, 17, 18, 19; 20, 21, 22, and all but the last paragraph of page 23 of appellee's brief are likewise verbatim copies from appellee's brief in this Court on the first appeal.

6.

On pages 36 and 37, appellee copies the calculation and method used in arriving at the present judgment. Examination will show that figures and method of calculation are identical with the figures and method of calculation which we gave the Court in our reply brief on the first appeal at pages 20 and 21, and which, as Justice Brandeis points out, were at that time attacked by the Commonwealth as not being correct.

> "The figures adopted by this Court are presented only in the brief of the plaintiff in error. They are protested by counsel for the Commonwealth." (274 U. S. 76-91.)

7.

In the appendix to the brief for appellee (pp. 50, 51, 52 and 53) there are given certain alleged "corrected figures." These figures exclude all figures of the Cumberland Railroad, the Cumberland Railway, and the Mobile and Ohio Railroad, the three controlled roads which counsel concede on page 6 of their brief should have been included.

We submit, as in our original brief, that the judgment of the State Court should be reversed.

Respectfully submitted,

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